In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 34.

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, ex rel.,
VIRGINIA STATE BAR,
Respondent.

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITION FOR REHEARING

AUBREY R. BOWLES, JR.
AUBREY R. BOWLES, III
901 Mutual Building
Richmond, Virginia 23219
Attorneys for the Respondent

ABBREVIATIONS

PB—Petitioner's Brief

PRB—Petitioner's Reply Brief

RBO—Respondent's Brief In Opposition

RB—Respondent's Brief

R—Record

SUBJECT INDEX

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It is incomprehensible to this respondent, The Virginia State Bar, that a majority of this Court could hand down on this record an opinion that completely and totally ignores (and thereby tacitly condones) the undenied history of more than thirty years of admittedly illegal, grossly unprofessional and persistently reprehensible conduct by the petitioner and its regional counsel, condemned or enjoined in some seventeen states. On the contrary, the opinion emphasizes the benevolent purposes of petitioner's plan and the claimed legal and moral competence of its selected lawyers. The majority appears to find that such a plan was and

is necessary to protect its members from "persuasive claims adjusters, eager to gain a quick and cheap settlement" and from other lawyers either incompetent or "too willing to settle a case for a quick dollar". The inference from such comparison is an insult, we submit, to the Bar of this nation.

The concluding statement of the majority opinion that the First and Fourteenth Amendments protect a "plan for advising workers who are injured to obtain legal advice and for recommending lawyers" is unclear in the light of the opinion as a whole and the uncontradicted facts shown by this record concerning the actual operation of the plan. It is unclear what the Brotherhood may do under the plan so defined and whether the plan permits the *solicitation* of legal employment for its regional counsel. The Brotherhood's intention is manifest from the statements of its counsel at the Bar of this Court that *solicitation* is the purpose, intent and actual operation of the plan,[1] notwithstanding that the right to solicit is not included in the questions presented by its petition or briefs.

The majority opinion creates the impression that the Court has approved active solicitation by the Brotherhood of legal employment for its selected lawyers and a plan under which the members of any group or association having common interests may select a lawyer for whom such group or association may properly solicit legal employment.

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[1] Mr. Naughton, arguing the case orally for the petitioner, plainly asserted that the Brotherhood intends to solicit and that its members do solicit legal employment for the selected lawyers: "We would agree that they solicit. We have a subsidiary point that says they don't unethically solicit." Mr. Naughton also argued that the constitutional privilege claimed by the Brotherhood also permits "that the union could advertise on behalf of a lawyer". (Report of oral argument by Gilbert Halasz, Reporter, at pages 103, 104-5).

Such an interpretation, of which the majority opinion is plainly susceptible, invites other groups to engage in practices long held to be within the state's power to prohibit by regulation of the practice of law.

It is to be hoped that the majority has not intended to approve the wholesale solicitation of legal employment by the petitioner or to extend the protection of the First and Fourteenth Amendments to the activities shown by this record.

The respondent, Virginia State Bar, accordingly prays the Court to grant rehearing of its decision of April 20, 1964, rendered in the above captioned matter, to reverse its erroneous interpretation of the Chancery Court decree and to affirm the same or, in any event, to make clear the meaning of the majority opinion in the light of the undenied facts shown by the record in this case.

REASONS FOR GRANTING REHEARING

1. The majority opinion does not make clear whether the Brotherhood may or may not *solicit* the legal employment by its members of specific lawyers.

The Brotherhood has asserted in its petition and briefs the constitutionally protected right to make known to its members: (1) "the advisability of obtaining legal advice before making settlement of their claims"; and (2) "the names of competent attorneys to handle such claims" (PB 2). It has not there asserted any other right than that so expressed (PB 2, 17, 21, 36, 38, 42, 46, 47-48, 58, 64; PRB 21, 22). Nor has the respondent, Virginia State Bar,

ever denied that right as properly and correctly interpreted by the Brotherhood's President Kennedy[2] and by its counsel appearing for it in the hearing of this matter before the Chancery Court of the City of Richmond,[3] namely, the advice to employ a lawyer and the mere recommendation of a specific lawyer, without more. For that reason the Virginia State Bar contested the jurisdiction of this Court to grant certiorari on the ground that there was no question for this Court to decide (RBO 1-3; RB 43-45).

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[2] Mr. Kennedy, then President of petitioner, testified by deposition in this cause in Cleveland, Ohio, on June 1, 1961, as follows (R. 37, 60):

Q. Well, now, Mr. Kennedy, you agree, then, that if any [fol. 218] member of the Brotherhood or any of the investigators sent out by you go any point further than merely suggesting the name of a lawyer, then he is in violation of the Illinois decree?

A. He would have that right under this to suggest—

Q. That isn't answering my question, sir. I don't believe that answers my question.

A. He would have the right to name the attorney who would have the capacity, in his opinion, to handle the claim successfully in any particular State.

Q. And that's as far as he could go under that letter?

A. That is right.

Q. Now, if he undertakes to take that man to the attorney he would be doing wrong, wouldn't he?

A. That is right. He would have no right to take him to the attorney.

Q. And he would have no right to try to persuade him to go to that particular attorney?

A. No, he could just mention the attorney's name.

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[3] Mr. Stallard, petitioner's only counsel at the *ore tenus* hearing of this matter in the Chancery Court of the City of Richmond, made this formal declaration of the Brotherhood's position in his opening statement to that court: "Mr. Stallard: The respondent alleges that it has the legal right, it has the constitutional right to advise with its [fol. 30] members, give them any information it has, and also to advise lawyers generally or specifically, *but not to channel business. I don't think it has that right.*" (R. 436-437. Italics ours).

The Brotherhood specified, without regard to context, the following parts of the Chancery Court decree, which it claimed deprived it of the constitutional right to advise its members to employ counsel before settling their claims and to recommend a specific lawyer (PB 14; PRB 20; R 27):

> "from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; * * * or in any other manner soliciting or encouraging such legal employment of the selected lawyers; * * * and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers; * * *."

The majority opinion also quotes the foregoing.

The second prohibition so quoted is against *soliciting* such legal employment of the selected lawyers. Both the petitioner and the majority opinion have omitted the full clause of which the quoted language is a part. The complete prohibition is (R. 27):

> "from informing any lawyer that an accident has occurred and furnishing the name and address of an injured or deceased member for the purpose of obtaining legal employment for such lawyer, or in any other manner soliciting or encouraging such legal employment of the selected lawyers;"

It is difficult to understand how a prohibition against soliciting and encouraging of such employment deprives the Brotherhood of its constitutionally protected right and

that the furnishing of names and addresses "for the purpose of obtaining legal employment for such lawyer" does not. But the distinction is of little importance when one considers what the Brotherhood has done and intends to do with the claimed constitutional right. The purpose, intent and objective of the Brotherhood is outright, actual solicitation.

The real objective of the Brotherhood, with which the three elements of the decree above quoted conflict was stated in its Reply Brief (PRB 21):

> "Such decree prohibits the Petitioner from any *effective advocacy* to its members 1) of the advisability of obtaining legal advice before making settlement of their claims and 2) of the recommendation of particular attorneys to handle such claims." (Italics ours).

At a later point therein the purpose to *advocate*, as opposed to mere recommendation, was made even clearer:

> "The American Bar Association, and the State Bar of Virginia, would prohibit *any effective assertion* of the injured employee's rights * * *." (PRB 25. Italics ours).

> "Because of this hostility [of all lawyers except union lawyers], the only effective way to see that union members obtain legal advice is to permit group referral to union lawyers. *This is the basis of Petitioner's plan* * * *. Those fundamental rights [freedom of speech and freedom of association] permit the Brotherhood to *advocate* the employment of those lawyers in whom the Brotherhood has confidence." (PRB 27. Italics ours).

That is the bald assertion of the intention to *solicit*, not the mere right to recommend. It is in exact conformity with Mr. Naughton's statement at the bar of this Court of what the petitioner is now doing, what it intends to do, and what it really means by the alleged right to *recommend* (see footnote 1, p. 2, *supra*).

It is also plain that this Court understood at the oral argument what the petitioner was claiming the right to do and what the respondent had sought to prevent, namely, the *solicitation* of legal business as well as a repetition of the other prohibited practices. When the writer of the majority opinion questioned respondent's counsel concerning the three specific prohibitions complained of by the Brotherhood (PB 14; PRB 20), those questions clearly recognized a distinction between mere recommendation and solicitation.[4]

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[4] JUSTICE BLACK: Referring to page 20 of your reply brief—

MR. BOWLES: No, sir; their reply brief.

JUSTICE BLACK: The one to which you referred, setting out the one, two, three to which objection is made. I would assume that those have to be decided, have to be decided as to the validity of those according to what they forbid?

MR. BOWLES: Yes, sir.

JUSTICE BLACK: Am I right in thinking that what those three are intended to forbid, right or wrong, is to forbid this union from picking out a group of lawyers and recommending them and them alone to its members who are injured and *soliciting* them, recommending to the injured members to do business with them and them alone, lawyers selected by them?

MR. BOWLES: That's correct.

JUSTICE BLACK: That is the fact, is it not, the sum total effect of the three?

MR. BOWLES: That's correct. When I was asked the question I was right on that point, sir, so if you will turn to page 21 [PRB 21] you will see that that is what they want to do—the next page.

JUSTICE BLACK: I was wondering if that is the right interpretation?

MR. BOWLES: I think so.

JUSTICE BLACK: And if you are right and the court is right, in

It is unclear whether the majority opinion preserves that distinction. But it is plain from the record that the petitioner has never made that distinction and does not intend to observe it. There is no doubt that the difference between merely recommending a lawyer, the right to do which has never been disputed, and the actual solicitation of legal employment was understood by other members of the Court.[5]

What does the majority opinion decide on that point? The ultimate decision is thus stated:

> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brother-

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Virginia, the union apparently would be forbidden from picking out a group of lawyers, recommending that group and that alone to its injured employees and *allowing the union to go and solicit them to hire its lawyers and its lawyers alone.*

MR. BOWLES: That, of course, the third thing, is what makes it wrong.

* * *

MR. BOWLES: * * * It isn't a question of recommending. It is a question of *solicitation*, advocating; and when we get to the question of whether there is a financial interest, I just read to you, in 1955 the interest was something over two and a half million dollars. (Report of oral argument by Gilbert Halasz, Reporter, at pp. 76-77, 81. Italics ours).

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[5] JUSTICE GOLDBERG: Mr. Bowles, before you sit down, if you were to strip from this case, and I recognize it is difficult in light of the background, the *solicitation aspect, the follow through*—if this case were a case of where a union concerned about its membership recommended that they seek legal advice, published a list of lawyers that they recommended as good lawyers, made investigations *but did not pursue it to the point of urging the man to hire the particular lawyers*, would you think that that would be prohibited by your decree?

MR. BOWLES: No, sir; and I think also, in answer to that question, that if the union would be content to do that, they would render a great service both to the bar and to the public. (Report of oral argument by Gilbert Halasz, Reporter, at p. 94. Italics ours).

hood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; * * *."

One part of the decree to which the Brotherhood objected as infringing the right asserted, and which the majority quoted at page 4 of its opinion, contains the following: "or in any other manner soliciting or encouraging legal employment of the selected lawyers".

It is not clear whether the Court intends to state that the First and Fourteenth Amendments protect the *solicitation* by the Brotherhood of legal employment for its selected lawyers or only the mere recommendation of those lawyers. Nor is it clear whether or not this Court has approved a plan the admitted purpose and operation of which produce the intended result of channeling all legal employment by its members to the selected lawyers and to them alone by means of "effective advocacy". If the plan so approved is expressly intended by the majority to be limited to advising members to employ counsel before settling a claim and to the mere recommendation of specific lawyers and nothing more, as may be assumed from the references to the plan contained in the opinion (see pages 4, 5, 7, and footnote 9) and that intention and construction is made clear, the nature and operation of the plan and what may be done under it will be clear. If, on the other hand, the plan so approved includes the purpose to solicit and to effectively advocate the employment of the selected lawyers by the means heretofore employed by the Brotherhood, as indicated by the Court's holding that the quoted parts of the decree must fall, the admittedly objectionable practices will continue under the claimed constitutional protection and the Court will not only

have invited the continuation by the Brotherhood of its past unprofessional practices but the eager adoption of them by others under the assumed protection of this opinion.

The concluding language of the majority opinion, standing alone, appears to strike down only such parts of the Chancery Court decree as infringe the right to carry out a plan "for advising workers who are injured to obtain legal advice and for recommending specific lawyers". The opinion also provides that "to the extent any other part of the decree forbids these activities it too must fall". Yet, the opinion orders that "The judgment and decree are vacated and the case is remanded for proceedings not inconsistent with this opinion". Without clarification, the Virginia court can only follow its construction and interpretation of the Court's opinion in determining what further proceedings are consistent therewith and what activities of the Brotherhood it may properly enjoin.

2. The majority erroneously concludes that "what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice," is not "ambulance chasing" and that neither the members nor the selected lawyers are "parties to any soliciting of business".

Commercialization of the legal profession that does threaten the moral and ethical fabric of our judicial system, ambulance chasing and the solicitation of legal employment are precisely what Virginia *has* sought to halt in this case. This record discloses without denial more than thirty years of the most sordid and brazen exercise of exactly those

reprehensible practices by the Brotherhood and its selected lawyers, in the face of cumulating injunctions followed by insincere protestations of reform, the latest of which the majority elects to believe.

The plan was admittedly conceived and put into operation with no disapproval of "ambulance chasing". The man who originally established the plan frankly agreed that he "sought to select men who may have used certain means to induce clients to come in there, but who would stand the scrutiny of any fairminded man as to whether their practices were reasonably decent" (R 814; RB 8-9).

From its inception the plan's purpose has been to solicit legal employment for its selected lawyers in order that it might "give regional lawyers a reasonable assurance of a sufficient volume of Brotherhood business to warrant the rendering of proper service on the basis of compensation agreed upon" (R 888). The cut-rate "basis of compensation agreed upon" has not changed (RB 43; R 194, 217, 274, 280, 285, 290, 304, 323, 334, 353, 363, 377, 379, 389, 390, 399, 418). The Chancery Court found that the purpose has not been changed.

Respondent has shown in great detail the practices engaged in by the Brotherhood and its selected lawyers in furtherance of the plan to solicit legal employment for those lawyers prior to April 1, 1959, (RB 7-33), and the continued use of those practices in at least Illinois, Ohio, Indiana, California and Georgia since April 1, 1959, including in one case the effort to have a member change his testimony and commit perjury (RB 34-43). Among the worst of these practices is the studied use of the injured

workman's friend as the "bird-dog" to secure the selected lawyer's employment and the compensation of the "bird-dog" for that service to the lawyer by the Brotherhood and also by the selected lawyer out of his part of the workman's recovery.

The record moreover discloses repeated consent decrees, to which the Brotherhood and its selected counsel have been signatory, that recognize the evils inherent in the plan, accept the injunction against them and agree to their discontinuance. Nevertheless, petitioner formally admitted in this case that the practices continued until April 1, 1959, and the proof shows that they did not then cease.

What greater threat could there be to the moral and ethical fabric of the administration of justice upon which the security of this republic in large measure rests? It is appalling that inferential approval of such a plan should come from the summit of our judicial system from which should emanate the inspiration to safeguard the highest concepts of professional conduct.

CONCLUSION

For the reasons set forth above and those stated in the Brief in Opposition to the Granting of Certiorari and the Brief for the Respondent, the Virginia State Bar respectfully urges that rehearing be granted and that, upon such rehearing, the decree of the Chancery Court of the City of Richmond be affirmed or, in any event, that the majority opinion be clarified so that upon remand further proceed-

ings in this cause may be consistent with a proper understanding of that opinion.

Respectfully submitted,

AUBREY R. BOWLES, JR.
AUBREY R. BOWLES, III
901 Mutual Building
Richmond, Virginia 23219
Attorneys for the Respondent

CERTIFICATE OF COUNSEL

Pursuant to the provisions of Rule 58 of the rules of this Court, the undersigned hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

AUBREY R. BOWLES, JR.

AUBREY R. BOWLES, III

901 Mutual Building
Richmond, Virginia 23219
Attorneys for the Respondent